

Court No. - 42

Case :- APPLICATION U/S 378 No. - 157 of 2023

Applicant :- Om Prakash

Opposite Party :- State Of U.P. And 5 Others

Counsel for Applicant :- Shamim Ahmad

Counsel for Opposite Party :- G.A.

Hon'ble Surya Prakash Kesarwani,J.

Hon'ble Ms. Nand Prabha Shukla,J.

1. Heard Sri Shamim Ahmad, learned counsel for the complainant/applicant and Sri K.P. Pathak, learned A.G.A. for the opposite party.

2. Learned A.G.A. has raised a preliminary objection as to the maintainability of this appeal on the ground that under Section 378(1)(a) of the Code of Criminal Procedure, 1973, appeal shall lie to the Court of Session against an order of acquittal passed by the Magistrate. *Per contra*, learned counsel for the applicant submits that against an order of acquittal in a complaint case, appeal shall lie to the High Court under Sub Section (4) of Section 378 Cr.P.C.

3. This appeal along with an application for Special Leave to Appeal, has been filed to challenge the Judgment and order dated 20.07.2023 passed by the Judicial Magistrate-II, Court No. 13 Basti in Complaint Case No. 3194 of 1999 (Om Prakash vs. Ashok Kumar and 4 Others) under Sections 467, 468 and 114 IPC, P.S.- Kotwali, District- Basti. By the impugned judgment and order, all the accused persons have been acquitted from the charges. Out of the five accused persons, the accused Ashok Kumar died during trial and, therefore, proceedings for trial of the accused Ashok Kumar was abated.

4. The complaint case was filed under Sections 467, 468 and 114 IPC. Section 467 IPC is the non-cognizable and non-bailable offence. Section 378(1)(a) provides for appeal from the order of the Magistrate to the Court of Session in respect of a cognizable and non-bailable offence. Thus, the aforesaid impugned judgment of the Magistrate does not fall within Clause (a)(1) of Section 378 Cr.P.C. Sub-Section (4) of Section 378 Cr.P.C. specifically provides that if such an order of acquittal is passed in any case instituted upon complainant and the High Court, on an application

made to it by the complainant in this behalf, grant Special Leave to Appeal from order of acquittal, the complainant may present such an appeal to the High Court. The appellant herein has filed an application for Criminal Misc. Special Leave to Appeal No. Nil of 2023 along with the appeal.

5. In our considered view, present appeal and Leave to Appeal Application No. Nil of 2023 is maintainable under Section 378(4) Cr.P.C.

6. Considering the explanation for the little delay of 17 days, the delay is condoned. The delay condonation application is disposed of.

Order on Criminal Misc. Special Leave to Appeal Application

7. Heard Sri Shamim Ahmad, learned counsel for the complainant/appellant and Sri K.P. Pathak, learned A.G.A. for the opposite party.

8. After arguments were heard at some length, learned counsel for the applicant/appellant states that the applicant/appellant does not want to press his Criminal Misc. Special Leave to Appeal application and, therefore, the application may be **dismissed** as withdrawn.

9. Learned A.G.A. does not oppose the request of the learned counsel for the applicant/appellant as aforesaid.

10. In view of the aforesaid, the Criminal Misc. Special Leave to Appeal No. Nil of 2023 is hereby rejected as withdrawn. Consequently, the appeal also stands **dismissed**. It is made clear that rejection of Criminal Misc. Special Leave to Appeal application and consequent dismissal of the present appeal shall have no affect on any case pending in the Civil Court including the suit stated to be pending involving challenge to the disputed Will. It is further made clear that any observation made in the body of this order shall not be treated as adverse to the applicant/appellant in the pending suit relating to the disputed Will or any other civil suit between the parties.

Order Date :- 13.10.2023

Shivani